Supreme Court, U. S.
FILED
FEB 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-480

CRISTOBAL CARDONA, *et al.*, *Cross-Petitioners,*

vs.

ELLIOT C. RICHARDSON, Attorney General, *Petitioner.*

No. 73-300

ELLIOT C. RICHARDSON, Attorney General, *et al.*, *Petitioners,*

vs.

ROBERT BUSTOS, *et al.*, *Cross-Petitioners.*

Brief on the Merits of American Farm Bureau Federation, California Farm Bureau Federation and National Council of Agricultural Employers, Amici Curiae.

RONALD H. BONAPARTE,
JOHN A. JOANNES,
3600 Wilshire Boulevard, Suite 1902,
Los Angeles, Calif. 90010,
MILTON C. GELENIAN,
1776 "K" Street, N.W.,
Washington, D.C. 20006,
LEON L. GORDON,
2600 Wilshire Boulevard, Suite 404,
Los Angeles, Calif. 90057,
THOMAS F. OLSON,
2855 Telegraph Avenue,
Berkeley, Calif. 94705,
ALLEN LAUTERBACH,
225 Touhy Avenue,
Park Ridge, Illinois 60068,
Attorneys for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6422

SUBJECT INDEX

Page

Interest of Amici Curiae 1

Summary of Argument 3

Argument 5

I.

An Order That the Petitioner Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Reside in Mexico, and Visit Their Families Daily or Seasonally, Would Be Unlawful 5

A. Respondents Seek Such an Unlawful Order From This Court 5

B. Any Affirmation of the Order Made by the Circuit Court Below, or the Granting of the Order Requested by Respondents, Would Violate the Legislative Intent of Congress as Shown by Its Ratification of Past Policy of the Immigration and Naturalization Service 6

C. Congress Has Ratified the Present Policy of the Service to Allow Lawful Permanent Resident Aliens Who Are Employed in the United States but Whose Families Live in Mexico or Canada the Privilege of the Informal Documentary Waiver Provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1) 13

D. Recent Court Decisions Would Allow the Equation of Employment With Residence for the Purpose of Defining Aliens Within the Coverage of 8 USC 1101(a)(27)(b) 15

Page

E. The Order by the Court Below and/or the Order Proposed by Respondents That the Immigration Service Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Residing in Mexico and Visit Them Daily or Seasonally, Would Violate the Procedural Due Process Rights of the Aliens Affected 17

II.

The Policy of the Attorney General of Classifying Lawful Permanent Resident Aliens Into Commuters and Noncommuters for Purposes of Enforcing the Immigration Act, Is Unlawful 20

III.

Daily or Seasonal Visits by Lawful Permanent Resident Aliens, Who Are Employed in the United States, to Their Families Who Reside in Mexico, Are Not Departures From the United States Which Can Be Regarded as Meaningfully Interruptive of the Aliens' Permanent Residence 23

Conclusion 30

Appendix. 22 CFR 42.124 .....App. p. 1

8 USC 1230 3

8 USC 1101(a)(15)(h) 4

8 USC 1101(a)(27)(b) 4

43 Statutes 155 5

General Order No. 86 6

8 USC 1181(b) 11

8 CFR 211.1(b)(1) 11

Report From the Committee on the Judiciary to Accompany H.R. 98, September 11, 1973 17

TABLE OF AUTHORITIES CITED

Cases Page

Barrese v. Ryan, 203 F.Supp. 880 (Dist. Conn. 1962) 15

Bridges v. Wixson, 326 U.S. 135 .....19, 22

Burciaga-Salcedo, Matter of, 11 I&N Dec. 665 6

Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973) 3, 6, 17, 20, 29

Cermeno-Cerna v. Farrell, 291 F.Supp. 521 (C.D. Calif. 1968) 15

Fook Hong Mak v. Immigration and Naturalization Service, 435 F.2d 730 (2nd Cir. 1970) .. 21

Gamero v. Immigration and Naturalization Service, Los Angeles Dist., 367 F.2d 123 (9th Cir. 1966) 25

Git Foo Wong v. Immigration and Naturalization Service, 358 F.2d 151 (9th Cir. 1966) 25

Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970) 10, 14, 20, 21

Graham v. Richardson, 403 U.S. 365 .....19, 22

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) .. 22

Hoffman-Arvayo, Matter of, Int. Dec. #2095 (1971) 28

Itzcovitz v. Selective Service Local Bd., No. 6, N.Y., N.Y., 447 F.2d 888 (2d Cir. 1971) 26

Japanese Immigrant Case, 189 U.S. 86 (1903) .. 18

Janati-Ataie, Matter of, Int. Dec. #2170 (1927) 27

Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929) 11

Kowng Hai Chew v. Colding, 344 U.S. 590 (1952) 19

Page

Lesto v. Day, 21 F.2d 307 (2nd Cir. 1927) 10

Lindberg v. Brenner, 399 F.2d 990 (D.C. Cir. 1968) 14

Massachusetts Trustees of Eastern Gas & Fuel Associate v. United States, 377 U.S. 235 (1964) .. 14

Rosenberg v. Fleuti, 374 U.S. 449 ....4, 23, 24, 28, 29

Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972) 3, 20, 22

Serpico v. Trudell, 46 F.2d 669 (D.C. Vt. 1928) .. 11

Tejada v. United States Immigration & Naturalization Serv., 346 F.2d 385 (9th Cir. 1965) 15

Toon-Ming Wong v. Immigration and Naturalization Service, 363 F.2d 234 (9th Cir. 1966) .. 25

Transatlantica Italiana v. Elting, 66 F.2d 542 (2d Cir. 1933) 10

United States v. Lehmann, 239 F.2d 663 (6th Cir. 1956) 16

Wadman v. Immigration and Naturalization Service, 329 F.2d 812 (9th Cir. 1964) 25

Whitfield v. Hanjes, 22 Fed. 745 (8th Cir. 1915) 18

Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir. 1965) 25

Miscellaneous

General Order No. 86 .....11, 13

House Report 981 14

House Report 982 14

Statutes

Page

Code of Federal Regulations, Title 8, Sec. 211.1 (b)(1) 4, 12, 13, 15, 20, 22, 30

Code of Federal Regulations, Title 22, Sec. 42.-124 5

Immigration and Nationality Act, Sec. 4(b) 10, 13

Immigration and Nationality Act, Sec. 101(a)(13) 23

Immigration and Nationality Act, Sec. 244(a) 25

United States Code, Title 8, Sec. 1101(a)(13) 4, 23

United States Code, Title 8, Sec. 1101(a)(15)(h) 6

United States Code, Title 8, Sec. 1101(a)(20) .. 29

United States Code, Title 8, Sec. 1101(a)(27)(b) 4, 13, 15, 16, 18, 20, 21, 22, 29, 30

United States Code, Title 8, Sec. 1181(b) .....4, 13 .....15, 20, 29, 30

United States Code, Title 8, Sec. 1230(a) 5

United States Code, Title 8, Sec. 1254(a)(Supp. 1965) 25

United States Constitution, Fifth Amendment 19

Textbooks

"Aliens in the Fields: The 'Green Card Commuter' Under the Immigration and Naturalization Laws", 21 Stanford Law Review (1969), p. 1750 .....10, 14

Computers, Illegals and American Farm Labor Problem, 48 New York University Law Review, pp. 339, 466 3

Gordon & Rosenfield, Immigration Law and Procedure, Sec. 6.17(a) 5

Page

48 New York University Law Review, pp. 439, 440, 476-480 ..... 10, 14

48 New York University Law Review, pp. 475-6 16

43 Statutes at Large, p. 155 10

66 Statutes at Large, p. 167 23

IN THE

Supreme Court of the United States

October Term, 1973
Nos. 73-480, 73-300

No. 73-480

CRISTOBAL CARDONA, *et al.*,

Cross-Petitioners,

vs.

ELLIOT C. RICHARDSON, Attorney General,

Petitioner.

No. 73-300

ELLIOT C. RICHARDSON, Attorney General, *et al.*,

Petitioners,

vs.

ROBERT BUSTOS, *et al.*,

Cross-Petitioners.

Brief on the Merits of American Farm Bureau Federation, California Farm Bureau Federation and National Council of Agricultural Employers, Amici Curiae.

Interest of Amici Curiae.

The California Farm Bureau Federation is a non-profit corporation organized under the laws of the State of California. It presently has approximately 62,000 members consisting primarily of farmers and others interested in farm problems in California. The American Farm Bureau Federation is a general farm organiza-

tion with more than 2,000,000 member families who belong to state farm bureaus in 49 states and Puerto Rico. It is a voluntary, nonprofit corporation, organized under the laws of the State of Illinois. The National Council of Agricultural Employers is a nonprofit corporation organized in the District of Columbia, composed of members who are agricultural employers in 46 states.

The Respondents, Robert Bustos and Lupe Marquila, are two California farm workers; the Respondent, United Farm Workers Organizing Committee, is an organization of farm workers. The Respondents filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The Cross-Petitioners, Cristobal Cardona, Jose Maria de la Garza, Placido Ruiz, and Julio Ruiz, are Texas farm workers who are granted the right to intervene as plaintiffs on behalf of themselves and all farm workers in Texas.[1]

The *amici curiae* represent substantially all of the employers of the farm workers represented by Respondents. Any adverse decision made by the Court in this case will substantially damage a great portion of agricultural employers in states along the Mexican border.[2] The damage to *amici* would be the same type

[1]Robert Bustos, *et al.*, are respondents in case number 73-300, *Attorney General v. Bustos.* Cristobal Cardona, *et al.*, are petitioners in case number 73-480, *Cardona v. Attorney General.* Both cases were consolidated for the purposes of filing briefs and oral argument by an order of the Court of Jan. 14, 1974. For the purpose of convenience in this brief, both respondents and cross-petitioners will be collectively referred to as "Respondents".

[2]In the *amici curiae* brief in support of Petition for Certiorari, originally filed in case number 73-300, the California Farm Bureau estimated that the adverse decision of the court below in

as that suffered by the California farming partnership known as Sam Andrews' Sons, outlined in *Sam Andrews' Sons v. Mitchell,* 457 F.2d 745 (9th Cir. 1972).

For example, in his Petition, the Attorney General said:

> "If the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment."[3]

The impact of such an order would be devastating to the employers represented by *amici* and to the agricultural economy of the United States.

Summary of Argument.

The Court of Appeals below classified as nonimmigrants all lawful permanent resident aliens who are employed in the United States, have their families reside in Mexico, and visit their families seasonally. Respondents would go further to have the classification include all lawful permanent residents who visit their families either daily or seasonally. Either order would violate the legislative intent of Congress, which has ratified the present and past policy of the Immigration and Naturalization Service to allow lawful permanent residents to work in the United States, have their families reside in Mexico or Canada and visit them on a daily or seasonal basis. This policy was first established in 1924, and has continued up to the present time. It is accom-

Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973), affected 150,000 out of a work force of 210,000, or 71.4%. See also the statistics in a note entitled "Computers, Illegals and American Farm Labor Problem", at 48 NYU Law Review 339, 466.

[3]Petition of Elliot L. Richardson, pp. 11 and 12.

plished by the Service equating employment with residence so that the lawful permanent resident aliens involved can take advantage of the informal documentary waiver provisions of 8 USC 1181(b), and 8 CFR 211.1(b)(1), available for all lawful permanent residents defined by 8 USC 1101(a)(27)(b). The order made by the Court below and/or requested by Respondents would also violate the procedural due process rights of the lawful permanent residence aliens in that it would subject them to deportation or exclusion proceedings with a conclusive presumption of deportability, which they could not rebut by the introduction of other evidence.

The policy of the Attorney General of classifying lawful permanent resident aliens into commuters and noncommuters for purposes of enforcing certain immigration regulations, such as the labor dispute provision of 8 CFR 211.1(b)(1), is unlawful. Such a classification is not rationally related to the administration of the Immigration and Nationality Act.

Finally, daily or seasonal visits by lawful permanent resident aliens, who are employed in the United States, to their families who reside in Mexico, are not departures from the United States which can be regarded as meaningfully interruptive of the alien's permanent residence under the authority of *Rosenberg v. Fleuti* 374, US 449. Since such visits are not "entries" within the meaning of 8 USC 1101(a)(13), they cannot be used as a basis for bringing deportation or exclusion proceedings.

ARGUMENT.

I.

An Order That the Petitioner Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Reside in Mexico, and Visit Their Families Daily or Seasonally, Would Be Unlawful.

A. Respondents Seek Such an Unlawful Order From This Court.

Paramount to any argument is a clarification of the order which Respondents seek.

First, the order is to affect aliens who are lawful permanent residents of the United States.[4] Any lawful permanent resident alien would have been issued an immigrant visa, pursuant to 22 CFR 42.124. Such an alien would have then had to enter the United States, and a record of lawful admission for permanent residence would have had to have been created under 8 USC 1230(a). Such a procedure would have been recorded on form I-181, and only then would the alien have been issued his alien registration receipt card, form I-151. Gordon & Rosenfield, *Immigration Law and Procedure*, §6.17(a).

Second, the order affects an alien, after admission for permanent residence, who: (1) was employed in the United States; (2) had members of his family residing in and/or a family home in Mexico or Canada; and, (3) visited this home either daily or seasonally while employed in the United States.[4]

The Court of Appeals below held that the status of such a lawful permanent resident alien would be re-

[4]Respondent's Cross-Petition, p. 10.

scinded, and he should be classified as a nonimmigrant under 8 USC 1101(a)(15)(h) of the Act, as long as his visits to his family are seasonal and not daily. *Bustos v. Mitchell,* 481 F.2d 479, 484 (D.C. Cir. 1973), footnote 14 emphasized.

Respondents go further. They wish the status of all lawful permanent resident aliens rescinded whether they visit their families in Mexico on a daily *or* seasonal basis. (Cross-Petition, p. 16.)

B. Any Affirmation of the Order Made by the Circuit Court Below, or the Granting of the Order Requested by Respondents, Would Violate the Legislative Intent of Congress as Shown by Its Ratification of Past Policy of the Immigration and Naturalization Service.

For the past 40 years, the Immigration and Naturalization Service has allowed a lawful permanent resident alien to work in the United States,[5] have his family reside in Mexico or Canada, and commute over the border for visits on either a daily or seasonal basis. A good summary of the rationale behind this policy is found in *Matter of Burciaga-Salcedo,* 11 I&N Dec. 665, 666 and 667, as follows:

"For generations prior to the Immigration Act of 1924, native and foreign-born citizens of foreign contiguous territory living there came daily to work in the United States and then returned to their homes. Immediately before the passage of the Immigration Act of 1924, they had been admitted as visitors on the basis of visitor's laws which were valid for a year and were good for successive applications for temporary admis-

[5]For purposes of convenience, the Immigration and Naturalization Service will be hereinafter referred to as the "Service".

sion. Passage of the 1924 Act raised a question as to whether a commuter was an immigrant rather than a visitor. The Act termed an alien an immigrant unless he proved he was a nonimmigrant. (An immigrant needed an immigrant visa—it was good for one entry only and could be issued only under restrictions not applicable to the issuance of nonimmigrant visas.) The nonimmigrant category pertinent to this discussion was that of the alien coming as a temporary visitor for 'business'. In this category the commuter was administratively first placed, permitting him to follow his regular employment in the United States and reside in foreign contiguous territory. Reluctance to disturb a long-standing custom, and reluctance to affect the delicate balance which existed between the United States and the contiguous countries dictated the decision. However, the pressure of other factors soon brought a change—there was a lack of specific law authorizing the entry of commuters as nonimmigrants, foreign-born citizens of contiguous territories who because of quota limitations could not obtain immigrant visas to enter the United States were, nevertheless, entering daily to work as commuters, and, there was rising unemployment in the United States—these factors gave rise to an administrative ruling that made the entry of commuters more difficult.

In 1927, it was administratively decided that under the 1924 Act an alien coming to work in the United States must be considered as an immigrant. (He could be admitted only if he had an immigrant visa and applied for admission for permanent residence.) Strict enforcement of this ruling would have seriously affected the livelihood of many on both sides of the border, the functioning of border cities, and the exist-

ence of friendly relations with the border nations. A compromise arose which followed the form of the law yet permitted a limited continuance of the commuter status. It was to treat the commuter who obtained an immigrant visa as if he lived in the United States although he continued to live in the contiguous territory.

An alien lawfully admitted for permanent residence and domiciled in the United States could be issued a border crossing card which authorized him to make a temporary visit to foreign continguous territory and to return to his home in the United States without presenting a new visa or other immigration document; therefore, why not require the commuter to obtain an immigrant visa, admit him for permanent residence, issue him a border crossing card, and then permit him, if he did not desire to live in the United States, to return to his home in foreign contiguous territory and to enter the United States daily on his border crossing card on the theory that he was returning from a temporary visit to contiguous territory? This arrangement was adopted in 1927.

There were difficulties in treating a commuter as if he was a domiciled alien. The alien actually domiciled in the United States attempting to enter as a returning resident with a border crossing card after a temporary visit outside the United States lost his right to reenter unless he established that he at all times maintained the intention of returning to his domicile in the United States. The commuter did not have a domicile in the United States and in many cases had no intention of moving here, was he therefore to be unrestricted in his right to reenter? The administrative solution was to equate employment with domicile. Then whether the

commuter was entitled to enter with his border crossing card as a returning resident turned on whether he was employed in the United States and whether he had ever abandoned the intention of working in the United States. This equality of treatment of the commuter and domiciled alien resulted in the ruling that since the domiciled alien lost his right to reenter the United States on a border crossing card if he was absent more than six months, the commuter lost his right to reenter on a border crossing card if he was unemployed for more than six months.

To treat the commuter as if he were a domiciled alien was a necessary if awkward fiction which permitted the practice to continue, but it was at odds with the administrative desire to have commuters make their homes in the United States. Soon rules concerning inspection and entry arose which made the commuter realize that not only would it be more convenient to live in the United States than to commute, but that loss of the right to enter the United States as a commuter could occur without his fault and even despite his intention to retain the right. Thus, the conclusive presumption arose that a commuter unemployed in the United States for more than six months had abandoned his intention to enter as a commuter—he could be readmitted to the United States to work only if he had a new immigrant visa. This conclusive presumption, with one exception, applied even though the commuter had retained the intention to commute and even though he had entered in the meantime to search for employment. This treatment was in contrast to that given the domiciled alien temporarily absent from the United States for more than six months; he, if he had not abandoned the intention to return, could be read-

mitted as a returning resident upon a waiver of the documentary requirements.

An exception to the conclusive presumption was made in the case of the commuter outside the United States for more than six months because of illness, accident, or pregnancy. With this background in mind, we may consider the facts in the case before us and the precedent decisions."[6]

This equation of employment with domicile was actually in accordance with the 1924 Act, which excepted from any quota restrictions aliens previously lawfully admitted to the United States as immigrants, returning after a temporary visit abroad. See §4(b) of the 1924 Act, 43 Statutes 155.

The classic set of decisions interpreting this section came in the U.S. Court of Appeals for the Second Circuit with Judge Learned Hand sitting on the panel. In *Lesto v. Day*, 21 F.2d 307 (2nd Cir., 1927), the Court said, at pp. 308 and 309, as follows:

> "Without attempting a complete definition of 'a temporary visit,' we may say that we think the intention of the departing immigrant must be to return within a period relatively short fixed by some early event."

This was followed by Judge Hand's decision in *Transatlantica Italiana v. Elting*, 66 F.2d 542 (2d Cir. 1933). The Court had to decide whether or not fines should be remitted in over 100 cases where

[6]A more complete history of this background is found in "Aliens in the Fields: The 'Green Card Commuter' Under the Immigration and Naturalization Laws", 21 Stanford Law Review 1750 (1969); 48 NYU Law Review 439, *supra;* brief of appellees, Ramsey Clark, *et al.*, in *Gooch v. Clark;* 24788, 24791, United States Court of Appeals for the Ninth Circuit.

Italian aliens, who had been lawfully admitted for permanent residence, were held as "not returning from a temporary absence abroad" and were, therefore, excludable. There are printed in the Appendix the cases found on pages 546 through 552 of the Opinion, where it was ruled the aliens were returning from a temporary absence abroad. The importance is that in each of these cases, Italian aliens immigrated to the United States for purposes of employment, kept their families in Italy, visited them on a regular basis and were still held to be returning from a temporary visit abroad. The rationale was that the alien, while in Italy, had a fixed intent to return to the United States at a date certain and carried out that intent.[7]

This same rationale is seen in General Order No. 86, issued by the Service in 1927.[8] Sections 4 and 5 forced aliens living along the border who worked in the United States, to obtain immigrant visas, but did not require them to intend to establish, or in fact establish, the residence of their families in the United States. The Supreme Court, in turn, in *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929), sustained the validity of General Order No. 86.

> "After General Order No. 86 of 1927 the commuter regulations prior to 1952 had been greatly condensed and finally consisted of a single sentence:
>
> 'Aliens entering the United States to engage in existing employment or to seek employment in this country and who desire to continue to reside in

[7]For a similar holding, see *Serpico v. Trudell*, 46 F.2d 669 (D.C. Vt. 1928).

[8]A verbatim copy of General Order No. 86 is set out in the Appendix.

foreign contiguous territory will be considered as aliens of the immigrant class.'

"After 1952 the substance of former 8 CFR 110.6 was republished as an internal Operations Instruction. The real 'rules' had been and continue to be the body of published administrative decisions on commuter cases. At any rate, on and after December 24, 1952, thousands of resident alien border-crossing card holders were permitted to cross the border on their way to work each day without interruption."[9]

Set forth in the Appendix is the result of a study of cases of the Board of Immigration Appeals, each one of which involves the exclusion of a lawful permanent resident alien whose family lived on the Mexican or Canadian side of the border. Each of these cases recognized the principle that a lawful permanent resident alien can be employed in the United States and still maintain a home for his family in Mexico or Canada. The difference in result is caused solely by the duration of employment.

The present policy of Petitioner is reflected in the Petition for Certiorari, pages 6 and 7, and the Stipulation of Facts set out on pages 34 and 35. Petitioner allows lawful permanent resident aliens to be employed in the United States, have their families reside in Mexico, visit them daily or seasonally, and be readmitted to the United States by presenting form I-151 at the border.[10]

---

[9]Brief of Appellee, Attorney General, *Gooch v. Clark, supra,* pp. 42 and 43.

[10]The fact that the Service tried to limit the activities of "commuter" aliens through the enactment of the labor dispute provision of 8 CFR 211.1(b)(1) in 1967 will be discussed later.

C. Congress Has Ratified the Present Policy of the Service to Allow Lawful Permanent Resident Aliens Who Are Employed in the United States but Whose Families Live in Mexico or Canada the Privilege of the Informal Documentary Waiver Provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1).

As has been previously pointed out, from 1927 to the present date, the Service has followed the policy of allowing lawful permanent residents to be employed in the United States, have their families reside in Mexico or Canada, and be allowed the documentary waiver provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1). This was done in 1927 by General Order No. 86, which confirmed the practice as consistent with the statutory language of §4(b) of the Act. This defined a nonquota immigrant as "an immigrant previously lawfully admitted to the United States who is returning from a temporary visit aboard." The present practice is based on §1101(a)(27)(b) of the Act, which allows the informal documentary waiver provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1) for an alien lawfully admitted for permanent residence who is returning from a temporary visit abroad.

Respondents urge this Court to hold that this practice of the Service violates the statutory language of 8 USC 1101(a)(27)(b). Certainly, when an alien who is employed in the United States, leaves to spend one or a series of nights with his family across the border, his stay there is temporary because he intends to come back to resume employment. " 'When statutes are susceptible of different readings, it is practically axiomatic that 'administrative interpretation practice and usage is accorded great weight as an extrinsic aid in interpretation of statutes by courts.' 3 Sutherland, *Statutory*

Construction, 6605 (Third Edition) 1943; *Halvering v. Winmill*, 305 U.S. 79; 59 Supreme Court 45; 83 *Lawyers Edition* 52 (1938). Such deference is paid by the courts, especially when the construction placed upon a statute by the administrative agency is contemporaneous with its enactment; the practice is long standing; or, the agency suggested the legislation subsequently enacted." *Lindberg v. Brenner*, 399 F.2d 990 (D.C. Cir. 1968).[11]

Since 1950, there have been numerous congressional hearings where "the commuter system" has been discussed. Three separate bills have been introduced which would affect "the commuter system".[12] Certainly, with the number of congressional hearings exploring the commuter system as affected by the decision of *Gooch v. Clark*, 433 F.2d 74 (9th Cir. 1970),[13] no one can accuse Congress of ignoring the problem.

In 1973, the House of Representatives passed the most complete revision of the Immigration and Nationality Act since 1965, HR 981 and HR 982.[14] The remarks of the chairman, the Honorable Peter W. Rodino, Jr., are made part of the Appendix. There is nothing either in HR 981, HR 982, or the remarks of Chairman Rodino to indicate Congress wishes to change the present "commuter system". Since the practice is longstanding and is known by Congress, which has made no effort to change it, the agency practice has been ratified.

---

[11]See also *Massachusetts Trustees of Eastern Gas & Fuel Associate v. United States*, 377 U.S. 235 (1964).

[12]A summary of all the hearings as well as proposed legislation to end the commuter system is set forth in 21 Stanford Law Review 1750, *supra*, and 48 NYU Law Review 440, *supra*.

[13]48 NYU Law Review at 476 through 480, *supra*.

[14]HR 981 passed the House on September 26, 1973; HR 982 passed on May 3, 1973. Both are now pending in the Senate Subcommittee on Immigration of the Judiciary Committee.

D. Recent Court Decisions Would Allow the Equation of Employment With Residence for the Purpose of Defining Aliens Within the Coverage of 8 USC 1101(a)(27)(b).

Barrese v. Ryan, 203 F.Supp. 880 (District of Connecticut, 1962) and *Tejada v. United States Immigration and Naturalization Serv.*, 346 F.2d 385 (9th Cir. 1965) both deal with the definition of an alien within the coverage of 8 USC 1101(a)(27)(b). Barrese was a Canadian who worked in the United States and regularly visited his sisters in Canada. He would stay in Canada two weeks to 30 days at a time, but leave clothes in the United States. He was held to be a lawful permanent resident alien who was returning after a temporary absence abroad.

Tejada was a lawful permanent resident who left the United States for the Philippines in 1946 and reentered in 1962. The issue was whether or not his original eighteen month absence was of such sufficient duration so as not to be considered "temporary" within the meaning of 8 USC 1101(a)(27)(b) and 8 USC 1181(b). Although Tejada's family was in the Philippines and his only tie to the United States was employment, the court ruled that as a matter of law, he might be eligible for reentry and remanded the matter for further administrative findings.

In *Cermeno-Cerna v. Farrell*, 291 F.Supp. 521 (C.D. Calif. 1968), fifteen lawful permanent resident aliens challenged the legality of their arrest and subsequent deportation proceedings under the labor dispute provisions of 8 CFR 211.1(b)(1). They were arrested because the Immigration Service contended they were "commuters" who worked in the United States, but lived in Mexico where their families resided. The Court held

the aliens were within the provisions of 8 USC 1101 (a)(27)(b); and, thus, not deportable, because of the following evidence:

> "The evidence as presented by each of the individual plaintiffs shows that each have been admitted for permanent residence in the United States and when leaving their residence, either from labor camps supplied by their employers or from rented homes, they left belongings in the United States and in each instance intended to return after a vacation to rest and visit with their families and friends." 291 F.Supp. at 530.

Finally, when a statute is capable of several meanings, recent court decisions have affirmed a policy of giving that meaning to it which would prevent deportation or exclusion.

> "Although it is not penal in character and not subject to the constitutional inhibition against the passage of an *ex post facto* law, deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings." [cites omitted] *United States v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956).

In summary, even if one concedes that 8 USC 1101 (a)(27)(b) is capable of two different meanings, one equating employment with residence; and the other against such an equation, the fact that the latter would mean deportation or exclusion of thousands of aliens should be sufficient to prevent its adoption.[18]

---

[18]For a further discussion of the hardship the end of the "commuter" program might cause, see 48 NYU Law Review at 475-6.

E. The Order Made by the Court Below and/or the Order Proposed by Respondents That the Immigration Service Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Residing in Mexico and Visit Them Daily or Seasonally, Would Violate the Procedural Due Process Rights of the Aliens Affected.

The court below in *Bustos v. Mitchell, supra,* held that all lawful permanent resident aliens which fit into the court's definition of seasonal commuters, must immediately be considered as nonimmigrants by the Service for purposes of enforcing the Immigration Act. 481 F.2d at 484. Respondents, in their Petition, ask that the order be expanded to affect all lawful permanent resident aliens which are classified as daily and seasonal commuters. The Attorney General, in judging the impact of these statements, has said that "if the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment." (Petition, at pp. 11 and 12.)

The order made by the court below and/or proposed by Respondents, would violate the procedural due process rights of the lawful permanent resident aliens involved, by establishing in deportation and/or exclusion proceedings a conclusive presumption that any lawful permanent resident alien whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country and who commutes daily or seasonally to work in the United States is not within

the coverage of 1101(a)(27)(b) of the Act regardless of any other evidence which might be produced to the contrary. 481 F.2d at 482.[18]

In the *Japanese Immigrant Case*, 189 U.S. 86, 100 to 101 (1903), this court in emphatic and unmistakable terms rejected any supposition that deportation could be ordered without a fair hearing for the alien involved. The Eight Circuit in *Whitfield v. Hanjes*, 222 Fed. 745 (8th Cir. 1915), discussed the *Japanese Immigrant Case, supra*, and summarized the essential elements of a fair hearing at page 749 as follows:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him, that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

[18] *Amici* agree that it would be possible for a lawful permanent resident alien to lose contact with the United States in such a way that he would not be returning from a temporary absence abroad; and, therefore, would be deportable and/or excludable. But certainly, the requirements of procedural due process would prevent any conclusive presumptions in an administrative hearing and would give the alien the right to present all evidence in his behalf.

This Court has followed these decisions in giving the same protection of procedural due process to lawful permanent resident aliens as to citizens. In *Bridges v. Wixson*, 326 U.S. 135, it ruled that the alien had been ordered deported without a fair hearing and reversed the judgment of the court below. Justice Murphy concurring, stated that a lawful permanent resident alien was ". . . invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment." 326 U.S. at 161.

In *Kowng Hai Chew v. Colding*, 344 U.S. 590 (1952), this Court held that a lawful permanent resident alien who went outside the United States on a vessel of American registry, with its home port in the United States, and upon completion of such voyage returned on such vessel to the United States was, from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment. What is important is that the court held this to be true for purposes of both a deportation and/or an exclusion hearing. 344 U.S. at pages 600 to 602.

More recently, in *Graham v. Richardson*, 403 U.S. 365, 376, this Court held that ". . . a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years, violate the equal protection clause."

These cases illustrate the vice of the blanket order made by the court below and/or urged by Respondents. Any order that would conclusively prevent lawful permanent resident aliens from producing evidence

to show that they were in fact within the coverage of 8 USC 1101(a)(27)(b) would violate procedural due process of law.

II.

The Policy of the Attorney General of Classifying Lawful Permanent Resident Aliens Into Commuters and Noncommuters for Purposes of Enforcing the Immigration Act, Is Unlawful.

Although the Service acknowledges that all lawful permanent resident aliens should receive the benefits of the documentary waiver provisions of 8 USC 1181 (b) and 8 CFR 211.1(b)(1),[17] it still claims the right to classify lawful permanent resident aliens into commuters and noncommuters for purposes of enforcement of other parts of the Immigration and Nationality Act. For example, the labor dispute provision of 8 CFR 211.1(b)(1), is acknowledged by Petitioner in the Stipulation of Facts to be applicable to "commuter" lawful permanent resident aliens only.[18]

The question of the validity of this provision was raised by the Circuit Court below in *Bustos v. Mitchell, supra,* when it asked ". . . does 8 CFR 211.1(b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they have previously been employed there?" 481 F.2d at 481. The question of the validity of the Service's position on this regulation was raised by Respondent in its Cross-Petition on pages 6 and 8.

In *Sam Andrews' Sons v. Mitchell, supra,* the Ninth Circuit held this labor dispute provision illegal.[19] The

[17]*Gooch v. Clark, supra.*

[18]Petition of Attorney General, pp. 35-37.

[19]It should be noted that Justice Wright, who wrote the dissent in *Gooch v. Clark, supra,* joined the unanimous panel in holding this provision illegal.

Court first noted that the labor dispute regulation and the Government's interpretation and application of it created two distinctions: ". . . first and primarily, the distinction between the commuter who works for a certified employer and the commuter who does not; and second, the distinction between the commuter and otherwise similar §1101(a)(27)(b) immigrants who permanently reside in the United States." 457 F.2d at 748. The Court held that in accordance with *Fook Hong Mak v. Immigration and Naturalization Service,* 435 F.2d 730 (2nd Cir. 1970), the Attorney General had the right to make regulations on considerations rationally related to the statute he is administering, but it held that the classifications made by the Service in this case were not rationally related to the administration of the Immigration and Nationality Act. At page 748 it stated as follows:

> "Nothing in the statute or its legislative history supports continuing regulation of alien laborers by the Secretary of Labor or by the Attorney General. Cermeno-Cerna v. Farrell, 291 F.Supp. 521, 528 (C.D., Cal., 1968). Congress empowered the Secretary and the Attorney General to regulate the initial entry of an alien into the United States, but once a commuter has been lawfully admitted, he may 'make regular entrances into the United States as an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."' *Gooch, supra,* 433 F.2d at 81.
>
> There is nothing in the statute or its legislative history intimating that Congress intended the green card system to be used as a means of Government intervention in domestic labor disputes."

As to the argument that the distinction could be discretion, it held that ". . . there is no rational basis to distinguish between commuters and resident §1101 (a)(27)(b) immigrants, as the District Court recognized that the commuter and the resident alien have the same immigration status." 452 F.2d at 749. It concluded, citing *Graham v. Richardson, supra,* as follows:

> "The commuter when on the job in the United States is entitled to full constitutional protection. His constitutional status is not terminated, altered or diminished because he spends the night across the border. *See Kwong Hai Chew, supra.* Such a departure is merely a 'temporary visit abroad.' *Gooch, supra,* 433 F.2d at 79-81." 457 F.2d at 749.[20]

Amici urges the Court to affirm the decision of the Ninth Circuit in *Sam Andrews' Sons v. Mitchell, supra.* Such affirmation could prevent the Service from categorizing those lawful permanent resident aliens who had not moved their families to the United States as "commuters" and enacting discriminatory regulations against them, such as the labor dispute provision of 8 CFR 211.1(b)(1). At the same time, such affirmation could prevent orgaizations, such as those represented by Respondents from pressuring the Service into discriminating between lawful permanent residents when such discrimination might be to their advantage.

---

[20]When the court used the term "constitutional protection", it did not explain whether it was talking about procedural due process or substantive due process. Because of the problems involved in granting substantive due process to aliens (*Bridges v. Wixon, supra; Harisiades v. Shaughnessy,* 342 US 580 [1952]), and because the Court decided that the regulation violated the legislative intent of Congress, we have not reached the question of whether or not the classification violates the constitutional rights of the aliens involved.

III.

Daily or Seasonal Visits by Lawful Permanent Resident Aliens, Who Are Employed in the United States, to Their Families Who Reside in Mexico, Are Not Departures From the United States Which Can Be Regarded as Meaningfully Interruptive of the Aliens' Permanent Residence.

In *Rosenberg v. Fleuti,* 374 U.S. 449, this Court considered the issue of whether a permanent residence alien's return to the United States from his afternoon trip to Ensenada, Mexico, constituted an "entry" within the meaning of §101(a)(13) of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 USC §1101(a)(13), such that said alien was excludable for a condition existing at that time even though he had been permanently and continuously a resident in this country for several years prior thereto.[21] More specifically, the Court considered whether the alien's short visit to Mexico could be regarded as a "departure to a foreign port or place . . . [that] was not intended" within the meaning of the exception to the term "entry" created by said statute. The Court concluded, at page 462:

---

[21]Section 101(a)(13) provides:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

"We conclude, then, that it effectuates congressional purpose to construe the intent exception to §101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,' *Davidson v. New Orleans*, 96 U.S. 97, 104, we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return. . . ."

Since *Fleuti* was decided in 1963, there has been development as to the above-mentioned relevant factors "by the gradual process of judicial inclusion and

exclusion." In *Toon-Ming Wong v. Immigration and Naturalization Service*, 363 F.2d 234 (9th Cir. 1966), petitioner sought review of the order of Board of Immigration Appeals denying his motion to reopen deportation proceedings and permit him to apply for suspension of deportation under the provisions of §244 (a) of the Immigration and Nationality Act, 8 USC 1254(a)(Supp. 1965). On instructions of his foster father, the alien, then 16, accompanied the daughter of the foster parent to her home in Canada to assist with her children during the journey. The intention was that the alien would return to his home in the United States within a week or two, and resume his high school studies. However, because of an illness in the family, the daughter asked that the alien remain to help her, and the alien's foster father agreed. The alien remained at his foster sister's Canadian home for six months before returning to the United States. The Court concluded that the alien's minority was a relevant circumstance, and remanded the case for certain factual and legal determinations. Of particular importance, was the Court's holding that the opinion of the Board of Immigration Appeals that a six-months' absence barred relief as a matter of law was in error. The Court, at page 236, stated:

"The length of absence is relevant, but not alone determinative."[22]

---

[22]The following absences have been held not to be meaningfully interruptive of the alien's permanent residence: 2-hours, *Git Foo Wong v. Immigration and Naturalization Service*, 358 F.2d 151 (9th Cir. 1966); 5-days, *Wadman v. Immigration and Naturalization Service*, 329 F.2d 812 (9th Cir. 1964); and, 1-week, *Zimmerman v. Lehmann*, 339 F.2d 943 (7th Cir. 1965). Seventeen years has been held to be meaningfully interruptive in *Gamero v. Immigration and Naturalization Service, Los Angeles Dist.*, 367 F.2d 123 (9th Cir. 1966).

It would appear that "judicial inclusion" is increasing. In *Itzcovitz v. Selective Service Local Bd., No. 6, N.Y., N.Y.*, 447 F.2d 888 (2d Cir. 1971), a permanent resident alien sought declaratory relief to enable him to reenter the United States after a proposed business trip to Israel without being subjected to exclusion proceedings. The Court, at pages 893-94, held:

> ". . . The time factor is, to be sure, longer than in *Zimmerman*, *Wadman* or *Fleuti*, but it is still limited to three weeks, and is fairly characterized as only temporary. The purpose of Itzcovitz's planned trip is in a real sense for the benefit of his employer; he is not merely vacationing, as were the petitioners in the other cases just mentioned. True, he doesn't have to go, but whether he would be able to keep his job, much less advance himself, without going to Tel Aviv is doubtful. In any event, he has been directed by his employer to go. In a general sense Itzcovitz 'intends' to go to Tel Aviv, just as Fleuti intended to go to Mexico. But appellant is not in the posture of having taken the trip in disregard of the immigration consequences; rather he has here sought relief in advance. The purpose of his trip is entirely *bona fide*, honorable and lawful. He has every intention of retaining permanently his residence in the United States. And, indeed, the sole purpose of the three week trip is to qualify him for more useful employment service as he continues his permanent residence. Under these circumstances—and we consider them limited—we do not think appellant's trip to Tel Aviv will be 'meaningfully interruptive' of his permanent residence 'within the meaning and ameliorative intent of the exception to §101(a)(13).' *Rosenberg v. Fleuti, supra*, 347 U.S. at 461, 462, 83 S.Ct. at 1812."

In *Matter of Janati-Ataie*, Int. Dec. #2170 (1927), the Board of Immigration Appeals went further. In this case, the permanent resident alien, an Iranian, returned to Iran in 1965 to visit his parents and was absent from the United States for a period of 35 days; and, in 1968 he made a second trip to Iran to introduce his wife and child to his parents, and he was absent from the United States for a period of 30 days. The Board concluded that the alien did not make "an entry" into the United States after either of these visits; at page 7, it pointed to the following:

> "All the cases since *Fleuti*, both before this Board and the courts, cited above and others, indicate quite clearly that no one factor is conclusive as to whether there was a meaningful interruption of the alien's legal permanent residence status, but they further indicate that most careful consideration must be given to the intent factor. The importance of the 'intent' element has been emphasized in all recent cases regarding entry.
>
> "It is our opinion that the respondent in the instant case did not make an entry when he returned from the two trips to Iran. The length of time he was away was a reasonable minimum time in which to travel to Iran for a visit with his parents. Also, this Board has never held that the distance from the United States of the country to which the alien goes is determinative, considering the swift jet airplane travel available.

> "It is true that the respondent did have to renew his Iranian passport, but here again no one factor is controlling. His intent not to interrupt or abandon permanent residence is indicated by the following facts: That his trips were of relatively short duration, that he had both real and personal property here, that he had an established home here, that he had a permanent steady job to which he was returning, that his wife and child, both United States citizens, are living with him here, and that the purpose of his trips was to visit his parents."

However, at the request of the Commissioner of Immigration and Naturalization, the Attorney General of the United States reviewed this decision and reached the opposite conclusion. *Id.* at pages 16-19.

The Board of Immigration Appeals has even gone so far as to hold that a permanent resident alien need only be physically present in the United States for more than six months in the aggregate during a particular year for creating the inference that there is no intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. In *Matter of Hoffman-Arvayo,* Int. Dec. #2095 (1971), the alien admitted for permanent residence maintained living quarters in the United States while gainfully employed for 5 days each week and visited his family in Mexico on intermittent weekends.[28]

In the instant case, an important issue is whether daily or seasonal visits by lawful permanent resident aliens, who are employed in the United States, to their families who reside in Mexico, are departures from

[28]The Board held there was no "entry" because of the *"Fleuti"* doctrine.

the United States which can be regarded as meaningfully interruptive of the aliens' permanent residence. Applying *Fleuti* and related authority, it should be clear that permanent resident aliens who remain in the United States for at least six months, whether at one time or in the aggregate in the case of those who live in the United States during the work week, have not meaningfully interrupted their residence. For, the length of their stay abroad is not excessive; they have not left for any purpose inconsistent with the immigration laws; they do not require special travel documents; and, they intend to return to the United States. Also, regarding those aliens who live in Mexico and daily commute to the United States to work, if work is equated with residence, their departures, too, cannot be regarded as meaningfully interruptive of their permanent residence.

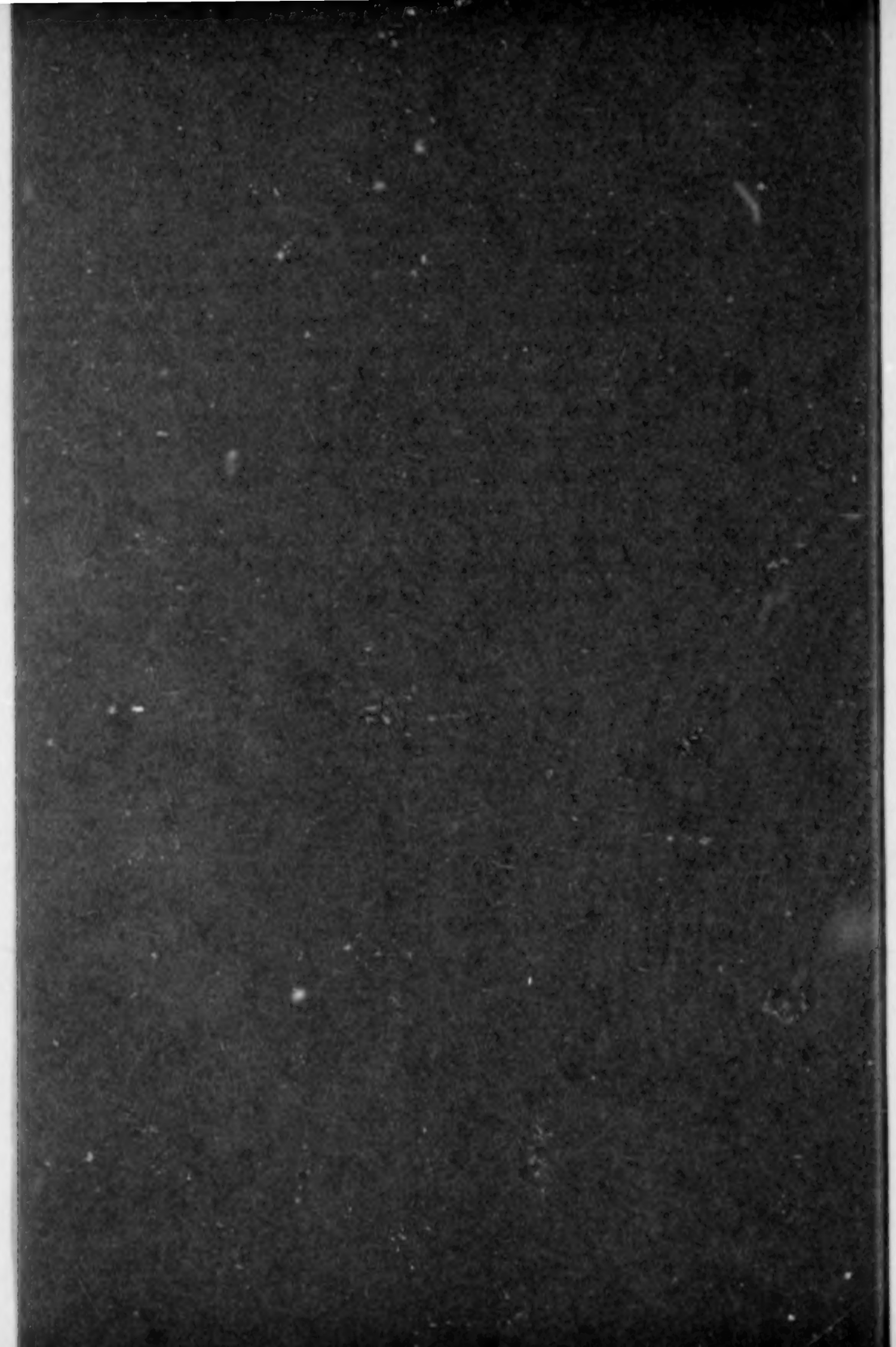
The court below in *Bustos,* 481 F.2d at 484, and Respondents held that "commuter" aliens are deportable because "each and every time an alien enters the United States, his entry must be legal as of that time." Since "commuter" aliens are not within the coverage of 8 USC 1101(a)(27)(b), they cannot be the beneficiaries of the informal documentary waiver provisions of 8 USC 1181(b), and their entries cannot be legal. However, this question is never reached if these aliens never make an "entry" under 8 USC 1101(a)(20) under the saving provisions of the *Fleuti* doctrine.

Conclusion.

For the above reasons, the *amici curiae* ask the Court to confirm the policy of the Petitioner in allowing lawful permanent resident aliens to equate employment with residence for the purposes of classification within the provisions of 8 USC 1101(a)(27)(b) of the Immigration and Nationality Act. The *amici* also ask the Court to confirm the past policy of the Service in allowing such aliens the informal documentary waiver provisions of 8 USC 1181(b). At the same time, however, the Court should make an order preventing the Petitioner from classifying permament residents into commuters and noncommuters for purposes of enforcing other policies, such as the labor dispute provision of 8 CFR 211.1(b)(1), which should be declared illegal.

Respectfully submitted,

RONALD H. BONAPARTE,
JOHN A. JOANNES,
MILTON C. GELENIAN,
LEON L. GORDON,
THOMAS F. OLSON,
ALLEN LAUTERBACH,
By RONALD H. BONAPARTE,
Attorneys for Amici Curiae.



APPENDIX.

22 CFR 42.124.

§ 42.124 *Procedure in issuing visas.*

(a) *Insertion of data.* In issuing an immigrant visa the pertinent information shall be inserted in the designated blank spaces provided on Form FS-511 (Immigrant Visa and Alien Registration), in accordance with the instructions contained in this section.

(1) A symbol as specified in § 42.12 shall be used to indicate the classification of the immigrant.

(2) An immigrant visa issued to an alien subject to numerical limitations shall bear the number assigned to the immigrant. The foreign state or dependent area limitation to which the alien is chargeable shall be entered in the space provided for such entry. If the alien is chargeable to the numerical limitation prescribed in section 21(e) of the Act of October 3, 1965, the notation "Western Hemisphere" shall be entered in the space on the face of the visa for "Foreign State/Dependent Area."

(3) Immediate relative visas issued under section 201(b) and special immigrant visas issued under the provisions of section 101(a)(27) (B) through (E) of the Act may be numbered in consecutive order at each consular office, beginning a new series on July 1 of each year, if the principal consular officer considers the numbering of such visas to be desirable. In issuing such visas, no entry should be made on the visa in the space provided for the foreign state or other applicable area limitation.

(4) The date of issuance and the date of expiration of the visa shall be inserted in the proper places

on the visa and shall show the day, month, and year in that order, the name of the month being spelled out, as "24 December 1952."

(5) In the event the passport requirement has been waived under the provisions of § 42.6, a notation shall be inserted in the space provided for the passport number, setting forth the authority (section and paragraph) under which the passport was waived.

(6) A signed photograph shall be attached in the space provided on Form FS-511 by the use of a legend machine unless specific authorization has been granted by the Department to use the impression seal only.

(7) A photograph, appropriately signed, shall be attached in the space provided on Form FS-511 by the use of a legend machine unless specific authorization has been granted by the Department to use the impression seal only.

(b) *Documents comprising visa.* Form FS-511, and Form FS-510, when properly executed, together with one copy of each document required by the consular officer in accordance with § 42.111 shall constitute an immigrant visa.

(c) *Attachment of documents.* Form FS-511 shall be placed immediately above Form FS-510 and the supporting documents attached thereto. The duplicate copies of Form FS-511, Form FS-510, and supporting documents shall be retained in the files of the consular office. Any document furnished to the consular officer by the alien's sponsor or other person with a request that the contents not be divulged to the visa applicant shall, if required to the be attached to the visa, be placed in an envelope and sealed with the impression seal of the consular office, before being attached to the

visa. If an immigrant visa is issued to an alien who is in possession of a U.S. reentry permit, whether valid or expired, the consular officer shall attach the permit to the immigrant visa for appropriate disposition at the port of entry by the Immigration and Naturalization Service. Documents submitted which have no bearing on the alien's qualifications or eligibility to receive a visa may be returned to the alien or to the person furnishing them.

(d) *Signature, seal and delivery of visa.* The consular officer who issues an immigrant visa shall affix his signature, indicate his title, and impress the seal of his office on Form FS-511 in a manner which partly covers the photograph and his signature. Thereupon, the immigrant visa shall be issued by delivery to the immigrant or his authorized agent or representative.

(Sec. 221, 66 Stat. 191; 8 U.S.C. 1201) [Dept. Reg. 108.429, 25 F.R. 3255, Apr. 15, 1960, as amended by Dept. Reg. 108.480, 27 F.R. 3626, Apr. 17, 1962; Dept. Reg. 108.528, 30 F.R. 14789, Nov. 30, 1965; Dept. Reg. 108.588, 33 F.R. 9399, June 27, 1968]

8 USC 1230.

§ 1230. *Records of admission*

(a) The Attorney General shall cause to be filed, as a record of admission of each immigrant, the immigrant visa required by section 1201(e) of this title to be surrendered at the port of entry by the arriving alien to an immigration officer.

(b) The Attorney General shall cause to be filed such record of the entry into the United States of each immigrant admitted under section 1181(b) of this title and of each nonimmigrant as the Attorney General deems necessary for the enforcement of the immigration laws.

8 USC 1101(a)(15)(h).

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

8 USC 1101(a)(27)(b).

(27) The term "special immigrant" means—

(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided*, That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(14) of this title;

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

43 Statutes 155.

NON-QUOTA IMMIGRANTS.

Sec. 4. When used in this Act the term "non-quota immigrant" means—

Term construed.

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

Minor child or wife of resident citizen applicant.

Post, p. 157.

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

Returning from temporary visit abroad.

General Order No. 86.

U.S. Department of Labor
BUREAU OF IMMIGRATION
Washington

April 1, 1927.

55479/537
55266/General.

SUBJECT: Land border crossing procedure.

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occurred prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

C. Natives of quota countries whose original admission occurred subsequent to June 2, 1921, and prior to May 11, 1922, who at the time of

such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of one year.

D. Natives of quota countries whose original admission occurred subsequent to May 10, 1922, and prior to July 1, 1924, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of five years.

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

Dated this ..... day of ....., 19.....,
at .....

.....
Immigrant Inspector.

8. Identification cards held or issued to aliens of the "nonimmigrant" class shall be rubber-stamped as follows:

NONIMMIGRANT

Dated this ..... day of ....., 19.....,
at .....

.....
Immigrant Inspector.

9. To insure uniformity stamps furnished by the Bureau, only, shall be used and blank spaces, including that for signature, shall be filled in by the use of indelible pencil.

10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

11. The work of validating outstanding cards should proceed slowly, systematically, steadily and persistently, and in such a manner as to avoid confusion, congestion, interference with proper routine administration and the giving of just grounds for complaint upon the part of the traveling public

12. The status of holders of identification cards shall be inquired into periodically, preferably every six months from date stamped, where practicable, but in any event not less frequently than once a year. When inquiry has been so made, it will be evidenced by a notation to show date of such inquiry and initials of the officer upon the reverse of the card. When the holder of a "nonimmigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

/s/ George J. Harris
GEORGE J. HARRIS,
Acting Commissioner General.

APPROVED:
/s/ Robe Carl White

ROBE CARL WHITE,
Assistant Secretary.

Cases found on pages 546-552 of the case of *Transatlantica Italiana v. Elting*, 66 F.2d 542, whereby Judge Learned Hand ruled that Italian aliens were returning from a temporary absence abroad and, therefore, not excludable:

Action No. 479.

No. 2. Absent one year five months. In United States seventeen years; wife and family in Italy; went to take care of old mother; meant to bring family here; overstayed six months because of wife's sickness; owned property in New Jersey.

No. 5. Absent one year five months. In United States nine years. Took wife to Italy with him; had property and business in both countries; delayed by sickness.

No. 7. Absent one year five months. In United States fourteen years. Took wife with him to visit and was sick for year with malaria.

No. 8. Absent one year two months. In United States eighteen years. Wife in Italy; took out passport within five months, but could not get passage.

No. 15. Absent one year four months. In United States nine years. Had declared intention to become citizen. Went to get married, but sick for eleven months. Warned on visa, but one member of Board voted to admit.

No. 18. Absent two years three months. In United States eight and a half years. Wife in Italy, whom he left to marry; one member voted to admit. Stayed over to get money from bank which failed.

Action No. 480.

No. 8. Absent one year one month. In United States sixteen years with one absence of a year. Evidence that he tried to return four months earlier.

No. 29. Absent one year six months. In United States twelve years. Wife and three children in Italy. Left motorcar here. Delayed by sickness. One member of Board voted to admit.

No. 54. Absent one year three months. In United States seven years. Declared intention just before leaving. Married, delayed by sickness, trachoma not discoverable.

8 USC 1181(b).

Readmission without required documents; Attorney General's discretion

(b) Notwithstanding the provisions of section 1182 (a) (20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 CFR 211.1(b)(1).

(b) *Aliens returning to an unrelinquished lawful permanent residence*— (1) *Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card, duly issued to him: *Provided*, That during such absence he

did not travel to, in, or through any of the following places: Cuba and Communist portions of Korea or Viet-Nam, and, except for children who have not attained the age of 16 at the time they apply for admission into the United States, Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Outer Mongolia, People's Republic of China, Poland, Romania, the Soviet Zone of Germany ("German Democratic Republic"), the Union of Soviet Socialist Republics, or Yugoslavia. The foregoing restrictions shall not apply when the alien has passed in direct and continuous transit through the Soviet Zone of Germany to Berlin from West Germany by automobile, rail, or plane and returned to West Germany; or when the alien has passed in direct and continuous transit through Yugoslavia to or from Austria, Greece, or Italy. An alien regularly serving as a crewman in any capacity required for normal operations and services aboard an aircraft or vessel of American registry who is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year may, in lieu of an immigrant visa, present Form I-151, duly issued to him, notwithstanding travel to, in, or through any of the restricted places named in this subparagraph pursuant to his employment as a crewman. An alien who proceeded abroad temporarily without a reentry permit and in whose case subsequent to his departure from the United States the Department of State has approved travel to, in, or through Cuba, or Communist portions of Korea or Viet-

Nam, may, in lieu of an immigrant visa or reentry permit, present Form I-151 together with the letter from the Department of State approving his travel to, in, or through the place or places named in the letter, if he is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year. An alien who proceeded abroad temporarily without a reentry permit and in whose case subsequent to his departure from and prior to his return to the United States the Service has approved travel to, in, or through any of the other place or places named in this subparagraph for which Form I-151 is not valid may, in lieu of an immigrant visa or reentry permit, present Form I-151 together with the letter from an officer of the Service approving his travel to, in, or through the place or places named in the letter, if he is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year. When returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad, a spouse or child of a member of the Armed Forces of the United States or of a civilian employee of the U.S. Government stationed foreign pursuant to official orders may, in lieu of an immigrant visa, present Form I-151, provided such spouse or child resided abroad while such member of the Armed Forces or such civilian employee was on overseas duty and is preceding or accompanying the member or employee, or is following to join

the member or employee in the United States within 4 months of the member's or employee's return, and during the temporary absence did not travel to, in, or through any of the restricted places named in this subparagraph, except those named places concerning which the restrictions do not apply when an alien has passed in direct and continuous transit through such areas. When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I-151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination.

APPENDIX

Cases Decided By the Board of Immigration Appeals

Case Name	Summary of Facts	Decision
Matter of Burciaga-Salcedo 11 I & N Dec. 665	Canadian lawful permanent resident commutes to employment in the United States from residence in Canada. Her employment was interrupted for more than 6 months because she had to care for a seriously ill child.	Not excludable.
Matter of Gerhard 12 I & N Dec. 556	A Canadian lawful permanent resident who was originally admitted in April of 1967 worked one week, quit his job and resumed employment in the U.S. 4 months later wanted to continue to commute from his home in Canada to his employment.	Not excludable.
Matter of Wighton 13 I & N Dec. 683	A Canadian lawful permanent resident wanted to continue to commute from his residence in Canada to his employment in the U.S. after a break in employment for approximately one year.	Excludable.
Matter of Hoffman-Arvayo 13 I & N Dec. 750	A Mexican lawful permanent resident resided and was employed in Tucson, Arizona and visited his family in Sonora, Mexico on intermittent weekends.	Not excludable.
Matter of Benavides, File No. A13 096 575 Unreported case, Los Angeles, Benjamin Myron, S.I.O. September 1, 1968	A family group of Mexican lawful permanent residents consisting of a husband, wife and son picked grapes in Delano from April to November of each year and lived in their home in Mexico from December to March.	Not excludable.

APPENDIX

Cases Decided By the Board of Immigration Appeals

On the issue of whether or not a lawful permanent resident alien was within the coverage of 8 USC 1101(a) 27(b) when the alien worked in the United States and his family lived in Canada or Mexico.

Case Name	Summary of Facts	Decision
Matter of D-C- 3 I & N Dec. 519	Canadian lawful permanent resident commuted to U.S. but never found employment.	Excludable.
Matter of L- 4 I & N Dec. 454	Canadian lawful permanent resident commuted to U.S. employment but was out of work for five months because of illness.	Not excludable.
Matter of H-O- 5 I & N Dec. 716	Mexican lawful permanent resident who lived in Mexicali and commuted to employment in Calexico.	Not excludable.
Matter of M-D-S- et al. 8 I & N Dec. 209	Three Canadian lawful permanent residents who had been unemployed in the U.S. for over six months wanted to continue to commute to their homes in Canada.	Excludable.
Matter of L- 8 I & N Dec. 643	Canadian lawful permanent resident who is employed in U.S. for 2 hours over a period of 10 months wanted to continue to commute to employment from home in Canada.	Excludable.
Matter of Bailey 11 I & N Dec. 466	A Canadian lawful permanent resident who lives and is employed full time in Canada commutes to part time self-employed work in the United States as a carpenter.	Not excludable.

Report From the Committee on the Judiciary to Accompany H.R. 981, September 11, 1973.

ADDITIONAL VIEWS OF THE HONORABLE PETER W. RODINO, JR.

I am in complete agreement with the major objectives of H.R. 981 and with one significant exception I strongly support this legislation. The 1965 amendments to the Immigration and Nationality Act abolished the national origins quota system and also imposed for the first time a numerical limitation of 120,000 on immigration from the Western Hemisphere. This limitation was added in the later stages of consideration of the 1965 legislation and it was not fully integrated into the basic design of the Immigration and Nationality Act since it failed to provide an adequate mechanism for selecting immigrants from the Western Hemisphere (i.e. preference system).

Therefore, when the Western Hemisphere ceiling took effect in July, 1968, there was an imbalance between the immigration provisions dealing with the Eastern and Western Hemisphere and this imbalance was directly attributable to the omission of a preference system for the Western Hemisphere. This omission has caused considerable hardship for citizens and lawful permanent residents of the United States as well as for many intending immigrants. The need for such a preference system has been universally recognized and the enactment of H.R. 981 will remedy this serious and unintended defect in our immigration laws.

Although this legislation will significantly advance the desirable goal of adopting uniform provisions for the Eastern and Western Hemisphere, this legislation deals very unjustly and unwisely with Canada and Mexico

by imposing a numerical limitation of 20,000 on immigration from each of these countries.

We must not fail to recognize that both Mexico and Canada stand in a relationship to us that is unique. We share common borders, we occupy the same continent. We cannot ignore these facts, even if we might wish to. It has been said that the same kind of argument was used to justify the national origins quota system which discriminated in favor of certain countries such as Great Britain, Ireland and Germany. It may well be that the same words were used, but their meaning was vastly different. The unique or special relationship which existed between us and those other countries was based on historical and sentimental considerations, combined with elements of racial prejudice. The uniqueness of our relationships with Canada and Mexico lies not merely in historical or sentimental factors, but more importantly in the practical day-to-day process of living together on the same continent.

Our dealings with Canada and Mexico are of a kind that merit the term "unique". There are reciprocal agreements concerning manufactured goods; many unions in the United States have locals in Canada; many American firms have branches in Canada and/or Mexico and many Canadians firms have branches in the United States. In addition, there are many cultural and social and other economic ties between our countries which link us together on a daily basis. Canada is our most important trading partner and we are theirs. Graduates of Canadian medical schools are eligible to seek licensure in the United States without the additional requirements that graduates of medical schools in other countries must meet.

Certainly this cooperative pattern has been mutually beneficial in promoting friendly relationships with our two contiguous neighbors. Recognizing the special relationship, the Administration in their bill, H.R. 9409, proposed separate immigration allotments of 35,000, annually for Canada and Mexico. Representatives of the Departments of State and Justice and the vast majority of public witnesses who testified before the Subcommittee on Immigration, Citizenship, and International Law supported an increased allotment of visa numbers for Canada and Mexico. However, the bill now reported by this Committee has rejected this recommendation. Instead, as I have noted, H.R. 981, as amended, imposes an annual limitation of 20,000 on immigration from all Western Hemisphere countries, similar to the present per-country limitation on Eastern Hemisphere countries.

On its face, this provision has the appearance of fairness since each country is treated in a uniform manner. While I am most sympathetic to the concept of equal treatment for all countries with respect to immigration, I feel that this equitable principle may have led us into an unfortunate situation in this particular case.

First of all, I agree that we cannot and should not attempt to solve any population or employment problems either country might have through our immigration policies nor do I believe that Canada and Mexico wish us to do so. But, it is very evident that our immigration policies are viewed in these countries as an aspect of our overall attitude toward them. Prior to 1968 there was no numerical limitation on immigration to the United States from any Western Hemisphere country. However, as a result of the 1965 legislation, all countries of this Hemisphere were subjected to the

120,000 hemispherical limitation. This limitation had a severe impact on immigration from Canada. Interestingly enough, the Canadians were aware of this development from its inception and began to launch diplomatic protests even before the ceiling became operative. Since that time the Canadians have discreetly and persistently made their objections known to our government. Mexico, on the other hand, was not adversely affected by the 1965 amendments and, in fact, has been the principal source of Western Hemisphere immigration for the past five fiscal years.

Consequently, at the present time we have a situation in which one of our neighbors has been drastically affected by existing legislation but the other one has not. H.R. 981, as amended, would have the unfortunate, dual result of failing to alleviate the adverse impact on Canadian immigration and at the same time creating a new restriction on Mexican immigration.

For example, the last annual report of the Immigration and Naturalization Service shows that during fiscal year 1972 there were 64,040 immigrants from Mexico, of whom 41,707 were subject to the Western Hemisphere numerical limitation. Enactment of the 20,000 ceiling would thus result in an immediate reduction of over 50% in lawful immigration from Mexico.

It seems to me that this drastic reduction in lawful immigration from Mexico is unsound and undesirable. In a bill designed to deal fairly with Western Hemisphere countries, it operates restrictively against our friendly neighbor, without any apparent justification. All of us are familiar with the enormous problem currently posed by illegal immigration from Mexico. In seeking to control that problem it seems essential to retain opportunities for legal immigration. Indeed, in its

Final Report of January 15, 1973, the Special Study Group on Illegal Immigration from Mexicio, appointed by the President after discussions with the President of Mexico, urged that there be no reduction in the present level of lawful immigration from Mexico. Yet H.R. 981 would accomplish an immediate reduction of over 50% in the number who could immigrate lawfully. By curtailing the opportunities for lawful immigration from Mexico, H.R. 981 would unfortunately give further impetus to the pressures for illegal immigration.

It is necessary for us to take into account also the effect of this measure on our foreign relations, particularly with Mexico. Since the actual effect of the 20,000 limitation would be a marked reduction in immigration from Mexico, the Government of that country might well regard this legislation as an affront to its people.

The difficulties that I have mentioned could be avoided by providing a separate visa allocation of 35,000 each to Canada and Mexico; or alternatively, by providing for the issuance of special visas to natives of these countries. The additional immigration that would be involved is insignificant and separate treatment for these countries can be justified because of the special relationship which exists with our neighboring countries. Through the simple expedient of increased ceilings or special visa allocations, we would demonstrate to our neighbors our awareness of their problems and our desire to deal with them in a constructive and cooperative manner. I believe that such a provision would greatly assist in promoting friendly relationships with Canada and Mexico and would certainly further our national interests.

Peter W. Rodino, Jr.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A.D. 1974.

_____

_____